



SOCAN

Society of Composers, Authors and
Music Publishers of Canada

Société canadienne des auteurs,
compositeurs et éditeurs de musique

C. PAUL SPURGEON

Vice President, Legal Services & General Counsel
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July 29, 2010

Pamela Miller
Director General, Telecommunications Policy Branch
Industry Canada
16th Floor, 300 Slater Street
Ottawa, Ontario
K1A 0C8

Dear Ms. Miller:

RE: FOREIGN INVESTMENT IN TELECOMMUNICATIONS SUBMISSION

INTRODUCTION

This Submission is filed on behalf of the members of ***The Society of Composers, Authors and Music Publishers of Canada/Société canadienne des auteurs, compositeurs et éditeurs de musique*** ("SOCAN"), in response to the Consultation Paper entitled **Opening Canada's Doors to Foreign Investment in Telecommunications** issued by the Government of Canada on June 11, 2010 (the "Paper").

When Parliament enacted the *Telecommunications Act*, it recognized the unique role the telecommunications sector plays in maintaining Canada's national identity and sovereignty, and specified that Canadian ownership and control must be promoted.

Section 7 of the *Telecommunications Act* defines the objectives of Canadian telecommunications policy, and includes the following key provisions:

It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives:

- (a) *to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;....*
- (d) *to promote the ownership and control of Canadian carriers by Canadians;...*



From the outset, it must also be recognized that changes to Canada's telecommunications foreign ownership rules cannot be considered in isolation from two key factors – the Canadian broadcasting sector, and Canada's international trade treaty obligations.

First, as a result of technological convergence and corporate integration, the dividing line between the *telecommunications* industry and the *broadcasting* industry has become blurred, and one industry cannot be considered in isolation from the other.

Therefore, one cannot ignore the broadcasting industry and the *Broadcasting Act's* cultural policy objectives in any consultation regarding foreign investment and other telecommunication issues.

Any direct or indirect impact on the broadcasting sector must be very carefully considered, because broadcasting is a public good that plays a critical role in Canada's democratic discourse, national identity, and sovereignty.

It would be premature to comment on the government's three options, or to proceed with any foreign ownership rule changes, until a comprehensive and transparent review of the broadcasting sector has been completed by the House of Commons Standing Committee on Canadian Heritage.

Second, globalization and international trade treaties make it impossible to discuss legislative and regulatory changes in a domestic vacuum. Before changing Canadian foreign investment rules, both the domestic and international treaty implications must be carefully considered for the telecommunications and broadcasting sectors, and for Canada's cultural sovereignty.

The onus is on the government to clearly establish that its foreign ownership and control proposals will not in any way impair Canada's ability to pursue Canadian Content and other cultural policies, now or in the future.

To ensure that the government discharges this onus, SOCAN submits that it should table an unequivocal legal opinion that demonstrates current and future Canadian Content rules and other cultural measures will not be adversely affected, directly or indirectly, by any changes to Canada's foreign ownership and control rules.

The scope of this Submission is not confined to the domestic telecommunications sector. Canadian cultural policy, the broadcasting sector, and international issues are also discussed under the following headings:



1. Who we are
2. Changes to foreign investment and control rules in the *telecommunications* sector will adversely affect the *broadcasting* sector
3. The government must not consider any changes that could impair Canada's ability to pursue culture and content policy objectives
4. Potential unintended effects of increased foreign direct investment cannot be ignored
5. Conclusion

1. WHO WE ARE

SOCAN is a not-for-profit Canadian-owned and operated organization that represents composers, lyricists, songwriters and publishers of musical works from across Canada and around the world.

On behalf of our over 35,000 active Canadian members, and members of the affiliated, similar societies from around the world, SOCAN collectively administers *performing rights* in music and lyrics -- musical works.

The performing right is that part of copyright that gives owners of musical works the sole right to perform in public, to broadcast their works, or to authorize others to do so, in return for royalty payments.

Performing rights are essential for music creators and their publishers because they are remunerated by the performing rights royalties they receive when their songs are used (i.e., performed in public or broadcast) by music users.

SOCAN's members are entrepreneurial risk-takers because they only receive copyright royalties for their creative efforts if their song is actually performed or communicated by others.

The tariffs of copyright royalties our members receive are determined by the Copyright Board of Canada. This quasi-judicial tribunal balances the interests of both creators and users, and allows interested parties an opportunity to be heard in transparent public hearings.



SOCAN's Canadian royalties depend on access to and by Canadians. For example, when broadcasters or other users communicate musical works written by Canadians, royalties remain at home with Canadian creators. On the other hand, when users play more foreign music, royalties are paid to foreign sources.

It is for this reason that SOCAN has always supported measures which promote the use of Canadian music, including the *Broadcasting Act* and the Canadian Content rules of the **Canadian Radio–television and Telecommunications Commission** (the “CRTC”).

As discussed below, SOCAN is concerned that, if foreign ownership or control rules in the broadcasting or telecommunications sectors are directly or indirectly changed, Canadian Content rules may be adversely affected.

2. CHANGES TO FOREIGN INVESTMENT AND CONTROL RULES IN THE TELECOMMUNICATIONS SECTOR WILL ADVERSELY AFFECT THE BROADCASTING SECTOR

The government has indicated that it wishes to make foreign ownership rule changes which somehow will be confined to the *telecommunications* sector and have no impact on the *broadcasting* sector.

However, it is not possible to draw a clear line or create a firewall between the telecommunications and broadcasting sectors, because many telecommunications carriers have been granted licenses and/or provide services under the *Broadcasting Act*.

Increasingly, telecommunications companies compete with broadcasters and cable companies in numerous markets – including Fixed Telephone, Mobile Cellular Phone, Internet, and broadcasting markets.

Integrated telecommunications/broadcasting companies have made it clear that foreign ownership rule changes in the *telecommunications* sector cannot be considered in isolation from the *broadcasting* sector.

For example, on June 16, 2010, the **House of Commons Standing Committee on Industry, Science and Technology** tabled a Report entitled ***Canada's Foreign Ownership Rules and Regulations in the Telecommunications Sector***.



Page 28 of this Report summarized the views of integrated Canadian telecommunication/broadcasting companies as follows:

Officials from Industry Canada indicated to the Committee that the removal of foreign ownership restrictions is under consideration for telecommunications industries only, not for broadcasting industries.

Since broadcasting distribution undertakings (BDU) are regulated under the Broadcasting Act, a number of witnesses (e.g., MTS Allstream, Shaw, Rogers, Bell, Telus) that are integrated market players (i.e., that are both telecommunications common carriers and BDUs) informed the Committee that they strongly oppose the potential differential treatment of telecommunications carriers and broadcasting distributors with respect to the liberalisation of foreign ownership rules.

They indicated that technological convergence has resulted in corporate convergence, and that creating an artificial difference between the two types of businesses from a regulatory standpoint would put them at a competitive disadvantage.

In addition, pages 7-8 of the Paper discuss the 2006 **Telecommunications Policy Review Panel**, and the 2008 **Competition Policy Review Panel**, both of which recognized the importance of the broadcasting sector in any reform of foreign ownership rules in the telecommunications sector.

Both of these Panels also recommended a review of Canada's broadcasting sector before making telecommunications foreign ownership rule changes. For example, the **Telecommunications Policy Review Panel** called for the establishment of a comprehensive review by independent experts of Canada's broadcasting policy framework, and stated:

*On the question of foreign ownership rules, the Panel recommends that **no changes be made** to the current limits on foreign ownership of telecommunications firms which are also licensed broadcasters, **pending the review** of the sector.*

(emphasis added)

The last comprehensive broadcasting review was conducted by the **House of Commons Standing Committee on Canadian Heritage** (the "Heritage Committee") over seven years ago.



On June 11, 2003, after hearing from more than 200 witnesses, the Heritage Committee tabled a 900-page Report, entitled ***Our Cultural Sovereignty: The Second Century of Canadian Broadcasting***.

On Page 421 of its Report, the Heritage Committee responded to the recommendations of the 2003 Industry Committee Report (which are described on Page 7 of the Paper, and form the basis for the Paper's Option 3):

The Heritage Committee strongly disagrees with the recommendations on foreign ownership made by the Industry Committee.

On Page 423 of its Report, the Heritage Committee stated:

The Committee recommends that the existing foreign ownership limits for broadcasting and telecommunications be maintained at current levels.

It would therefore be premature to comment on the government's three options, or to proceed with any foreign ownership rule changes, until another comprehensive and transparent review of the broadcasting sector has been completed by the House of Commons Standing Committee on Canadian Heritage.

3. THE GOVERNMENT MUST NOT CONSIDER ANY CHANGES THAT COULD IMPAIR CANADA'S ABILITY TO PURSUE CULTURE AND CONTENT POLICY OBJECTIVES

Under the heading "Telecommunications and Broadcasting", Page 10 of the Paper states:

Telecommunications and broadcasting are subject to different legislative authorities and objectives. Telecommunications is subject to the Telecommunications Act, the objectives which are primarily economic in nature, such as enhancing the competitiveness and efficiency of Canadian telecommunications, fostering increased reliance on market forces and ensuring that regulation, when required, is efficient and effective. In 2006, the Government of Canada reinforced this market-driven approach by issuing a policy direction to the CRTC to rely on market forces to the maximum extent feasible.

SOCAN does not agree that the objectives of the *Telecommunications Act* are simply economic. As noted above, when Parliament enacted the *Telecommunications Act*, it recognized the unique role the telecommunications sector plays in maintaining Canada's national identity and sovereignty, and specified that Canadian ownership and control must be promoted.



As noted above, Section 7 of the *Telecommunications Act* defines the objectives of Canadian telecommunications policy, and includes the following key provisions:

It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives:

- (a) *to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;....*
- (d) *to promote the ownership and control of Canadian carriers by Canadians;...*

These statutory social and ownership objectives are fundamental and cannot be ignored in any discussion about diluting Canadian ownership and control in the telecommunications sector.

Under the heading "Telecommunications and Broadcasting", Page 10 of the Paper also states:

*The objectives of the Broadcasting Act, however, are more cultural and social in nature, for example **encouraging the production and availability of Canadian content** and reflecting Canadian values. While it is recognized that **telecommunications and broadcasting are increasingly converging**, the policy objectives and legislative authorities under the Telecommunications Act and the Broadcasting Act are distinct, and the government is not considering changes to the Broadcasting Act. **With respect to broadcasting content and culture, the government will not consider any action that could impair its ability to pursue Canadian culture and content policy objectives.***

(emphasis added)

The Paper recognizes that market forces are not sufficient to attain Canada's cultural and content objectives. Enlightened government policies and legislation are also required, including measures that encourage both the *production* and the *availability* of Canadian Content.

Access to Canadian Content requires more than availability of content. Access also requires prominence of availability or "shelf space", which facilitates the actual consumption of content. Canadian Content rules play a critical role in ensuring Canadians have such access.



History has shown that it is easier to apply Canadian Content rules to Canadian-owned firms than to foreign entities – e.g., the 1997 World Trade Organization (“WTO”) split-run magazine dispute with the United States.

Canada uses foreign ownership and control rules in the broadcasting sector to promote our national interests and Canadian cultural sovereignty. Canada is not alone in this regard because our major trading partners also limit the foreign ownership of broadcasters.

On Page 43 of its 2007 consultation paper entitled *Sharpening Canada’s Competitive Edge*, the **Competition Policy Review Panel** described broadcasting foreign ownership limits as follows:

While some developed countries have no restrictions, others like the U.S., France and Japan have foreign ownership limits on over-the-air broadcasters.

In Canada, our relatively small, diverse population and the availability of U.S. broadcasts limit the degree to which market forces alone can ensure the provision of a range of Canadian news and entertainment programming in both official languages.

Canadian ownership rules in broadcasting and broadcasting distribution, established under the Broadcasting Act, ensure that Canadian news and entertainment programming is made from a Canadian perspective and with Canadian audiences in mind.

The *Broadcasting Act’s* objectives cannot be achieved by simply liberating domestic or foreign market forces and hoping for the best. Canada must continue to use foreign ownership and control rules in the broadcasting sector to promote our national interests and Canadian cultural sovereignty.

4. POTENTIAL UNINTENDED EFFECTS OF INCREASED FOREIGN DIRECT INVESTMENT CANNOT BE IGNORED

Page 11 of the Paper raises a fundamental question – *Are there potential unintended effects of increased foreign direct investment in the Canadian telecommunications sector?*

One of the potential unintended effects is that a foreign investor may attack Canadian Content rules on the grounds that they constitute illegal “performance



requirements” under the **North American Free Trade Agreement** (“NAFTA”) or other international trade treaties.

The investment chapter of the NAFTA creates absolute standards that Canada must apply to NAFTA and other foreign investors – even if Canada does not apply these standards to its own nationals.

NAFTA Article 1106(1) creates obligations regarding “performance requirements”, which limit a state’s ability to develop its domestic economy by requiring foreign investors to increase exports, decrease imports, balance trade, transfer technology, or to use **local labour, goods, or services**:

No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:

-
- (b) *to achieve a given level or percentage of domestic content;*
 - (c) *to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;...*

Article 1106 could limit the application of CRTC Canadian Content regulations to foreign investors, which would adversely affect SOCAN's Canadian members.

The NAFTA's "cultural exemption" has not effectively shielded Canadian cultural measures from attack – e.g., the WTO split-run magazine dispute with the United States.

Moreover, on May 17, 2010, Japan filed a communication at the **World Trade Organization** (the “WTO”) in which it attacked Ontario’s *Green Energy Act, 2009* and its Feed-In Tariff (“FIT”) program as follows:

With regard to Ontario's FIT program, we are seriously concerned about its requirement for the use of domestic content in order to be eligible for the program (i.e., its “local content requirement”).

....

We are also seriously concerned that even one FIT program which contains a local content requirement may trigger the introduction of other FIT programs which contain local content requirements, and may result in the proliferation of local content requirements in the future.



Foreign ownership rule changes cannot be treated as a purely domestic issue, because Canada's international trade treaty obligations may trigger unintended consequences.

SOCAN therefore submits that, if the government wishes to consider opening the Canadian telecommunication or broadcasting sectors up to foreign investors, it must carefully measure the risks of triggering international trade obligations that, so far, have not been an issue due to the lack of foreign control in the broadcasting sector.

To ensure that the government fulfills its commitment not to "consider any action that could impair its ability to pursue Canadian culture and content policy objectives", SOCAN submits that it should table an unequivocal legal opinion that demonstrates current and future Canadian Content rules will not be adversely affected, directly or indirectly, by any changes to Canada's foreign ownership and control rules.

5. CONCLUSION

SOCAN welcomes the government's commitment not to "consider any action that could impair its ability to pursue Canadian culture and content policy objectives."

Both the 2006 **Telecommunications Policy Review Panel**, and the 2008 **Competition Policy Review Panel** called for a review of Canada's broadcasting and cultural policies before proceeding with recommended foreign ownership rule changes.

It would be premature to comment on the government's three options, or to proceed with any foreign ownership rule changes, until a comprehensive and transparent review of the broadcasting sector has been completed by the House of Commons Standing Committee on Canadian Heritage.

In addition to considering the impact of telecommunications foreign ownership rule changes on broadcasting and Canadian culture, the government must carefully consider potential international trade treaty consequences and their impact on Canada's cultural sovereignty.

Canadian Content rules and other government measures are necessary to safeguard Canada's cultural sovereignty. These measures must not be trumped by National Treatment, Performance Requirements restrictions, or any other



international investment obligations that could impair Canada's ability to pursue Canadian culture and content policy objectives, now or in the future.

The onus is on the government to demonstrate that none of its foreign ownership proposals "could impair its ability to pursue Canadian culture and content policy objectives".

To ensure that the government discharges this onus, SOCAN submits that it should table an unequivocal legal opinion that demonstrates current and future Canadian Content rules and other cultural measures will not be adversely affected, directly or indirectly, by any changes to Canada's foreign ownership and control rules.

~ End of Document ~

Yours truly,

A handwritten signature in black ink, appearing to read "C. Paul Spurgeon", is written over a light grey, stylized signature graphic.

C. Paul Spurgeon

CPS/jb